

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND) MDL NO. 13-02419-FDS
COMPOUNDING)
PHARMACY CASES LITIGATION)
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BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

STATUS CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 2
One Courthouse Way
Boston, MA 02210

January 10, 2014
1:30 p.m.

Valerie A. O'Hara, FCRR, RPR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 3204
Boston, MA 02210
E-mail: vaohara@gmail.com

1 APPEARANCES:

2 For The Plaintiffs:

3 Hagens, Berman, Sobol, Shapiro LLP, by THOMAS M.
4 SOBOL, ESQ. and KRISTEN JOHNSON PARKER, ATTORNEY,
5 55 Cambridge Parkway, Suite 301, Cambridge,
6 Massachusetts 02142;

7 Janet, Jenner & Suggs, LLC, KIMBERLY A. DOUGHERTY,
8 ATTORNEY, 75 Arlington Street, Suite 500, Boston,
9 Massachusetts 02116;

10 Crandall & Katt, by PATRICK THOMAS FENNELL, ESQ.,
11 366 Elm Avenue, SW, Roanoke, VA 24016;

12 Branstetter, Stranch & Jennings, PLLC, by BEN GASTEL,
13 ESQ., ESQ., 227 Second Avenue North, Nashville,
14 Tennessee 37201-1631;

15 Law Offices of Mark Zamora and Associates,
16 MARK ZAMORA, ESQ., 5 Concourse Parkway, Suite 2350
17 Atlanta, Georgia 30328

18 FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS:

19 Brown Rudnick, by DAVID J. MOLTON, ESQ., Seven Times
20 Square, New York, New York 10036;

21 Brown Rudnick, by KIERSTEN A. TAYLOR, ATTORNEY,
22 One Financial Center, Boston, Massachusetts 02111;

23 Harris Beach PLLC, by FREDERICK H. FERN, ESQ.,
24 100 Wall Street, New York, New York 10005;

25 Tucker & Ellis LLP, by MATTHEW P. MORIARTY, ESQ.,
1150 Huntington Building, 925 Euclid Avenue, Cleveland,
Ohio 44115-1414;

Michael's, Ward & Rabinovitz LLP, by DAN RABINOVITZ,
ESQ., One Beacon Street, Boston, Massachusetts 02108;

Todd & Weld LLP, by CHRISTOPHER R. O'HARA, ESQ. and
CORRINA L. HALE, ATTORNEY, 28 State Street, 31st Floor,
Boston, Massachusetts 02109;

Ulmer & Berne LLP, by JOSHUA A. KLARFELD, ESQ.,
1660 West 2nd Street, Suite 1100, Cleveland, OH
44113-1448;

1 For the Defendants (CONTINUED):

2 Donoghue, Barrett & Singal, P.C., by MICHELLE R.
3 PEIRCE, ATTORNEY, ESQ., One Beacon Street, Boston,
Massachusetts 02108-3106;

4 Donovan & Hatem, LLP, by KRISTEN R. RAGOSTA, ESQ.,
5 Two Seaport Lane, Boston, Massachusetts 02210;

6 Nutter, McClennen & Fish LLP, by SARAH P. KELLY,
7 ATTORNEY, World Trade Center West, 155 Seaport
Boulevard, Boston, Massachusetts 02210-2604;

8 Fulbright & Jaworski, LLP, by MARCY H. GREER,
9 ATTORNEY and YVONNE K. PUIG, ATTORNEY, 98 San Jacinto
Blvd, Suite 1100, Austin, Texas 78701;

10 Law Offices of Jay J. Blumberg, ESQ., by JAY J.
11 BLUMBERG, ESQ., 158 Delaware Street, P.O. Box 68,
Woodbury, New Jersey 08096;

12 Curley & Curley, P.C., by LISABETH RYAN KUNDERT,
13 ATTORNEY, 27 School Street, Boston, Massachusetts
02108;

14 Sloane and Walsh, ROBERT A. GAYNOR, ESQ.,
15 Three Center Plaza, Boston, Massachusetts
02108;

16 FOR PAUL D. MOORE, IN HIS CAPACITY AS CHAPTER 11 TRUSTEE
OF NECP, INC.:

17 Duane Morris LLP by MICHAEL R. GOTTFRIED,
18 ESQ., 100 High Street, Suite 2400, Boston, Massachusetts
02110-1724;

19 VIA PHONE FOR THE PLAINTIFFS:

20 Melvin B. Wright
21 David Gibson
22 John Fishwick
23 Greg Lyons
24 James Stephen King
25 Mary Gidaro
Matthew Barsenas
Frank Federico
Michael Coren
Harry Roth
Will Riley

1 VIA PHONE FOR THE PLAINTIFFS (CONTINUED) :

2 Terry Dawes
3 Robert Briley
4 Edward (Ned) Mulligan
5 Karren Schaeffer
6 Deborah Gresco-Blackburn
7 Chris Cain
8 Laura Pittner
9 Jonathan Griffith
10 Sharon Houston
11 Leslie Muse
12 Jonathan Krohnfeldt
13 Sean Roth
14 Mark Dancer
15 Dan Myers
16 Ann Mandt
17 Steven Resnick
18 Alex Apostolou
19 Patrick Montoya
20 Frederick (Rick) Ellis
21 Nolan Nicely
22 S. James Boumil
23 Robert Randall
24 Brent Brown
25 Amanda Williams
26 George Nolan
27 Evan Baker
28 Lauren Ellerman
29 Nicole Kreklau
30 Daniel Clayton
31 Lisa Esser-Weidenfeller
32 Scott Kaminski
33 Kristi Osterday
34 Douglas Mulvaney`
35 Ed Jazlowiecki
36 Stephen W. Mullins
37 Bill Leader
38 Daniel Frith
39 Bryan Bleichner
40 Rebecca Blair
41 Elliot Olsen
42 Mark Abramowitz
43 Stephanie Arndt
44 Robert Young
45 Bridget Stratton
46 J. Kyle Roby
47 Mark Chalos
48 Ted Corvey
49 Nolan Nicely

1 VIA PHONE FOR THE PLAINTIFFS (CONTINUED):

2 Steffani Cochran
Rick Morgan
3 Anthony Agudelo
Steffani Cochran
4

5 VIA PHONE FOR THE DEFENDANTS:

6 Stephen A. Grossman
Nichole Dorman
Jason D Lewis
7 Joseph R. Lang
Chris J. Tardio
8 Matthew Cline

9 ALSO APPEARING VIA TELEPHONE:

10 Jacqueline Palank, Wall Street Journal
11
12
13
14
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18
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21
22
23
24
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PROCEEDINGS

THE CLERK: All rise. Thank you, all.
Please be seated. Court is now in session in the matter
of In Re: New England Compounding Pharmacy, Incorporated
Products Liability Litigation. This is Case
No. 13-md-02419.

Counsel, please note your appearances for
the record. We'll start with the PSC.

MR. SOBOL: Good afternoon, your Honor,
Tom Sobol for the plaintiffs' steering committee.

MS. PARKER: Good afternoon, your Honor,
Kristen Johnson Parker for the plaintiffs' steering
committee.

MR. ZAMORA: Mark Zamora for the PSC.

MS. DOUGHERTY: Good afternoon, your Honor,
Kim Dougherty from Janet, Jenner & Suggs on behalf of
the PSC.

MR. GASTEL: Good afternoon, Ben Gastel from
Branstetter, Stranch & Jennings on behalf of the PSC.

THE COURT: Good afternoon, all.

MR. FENNEL: Good afternoon, your Honor,
Patrick Fennell from Crandall & Katt, Roanoke, Virginia
for the PSC.

MR. MOLTON: Good afternoon, your Honor,
David Molton and Kiersten Taylor of the creditors'

1 On November 13 last year, Judge Boal entered a discovery
2 order requiring all subpoena recipients to produce
3 documents pursuant to the PSC subpoena if they have a
4 patient who has sued them or a patient who has a case
5 pending in the MDL or given notice of a claim against a
6 clinic in the NECC litigation.

7 So far, 21 clinics have deposited documents
8 into the PSC repository at U.S. Legal Support. That
9 includes approximately 1300 documents and approximately
10 7,000 pages. There are 15, approximately 15 clinics
11 that have taken the position that they do not have any
12 such patients and are not required to produce any
13 documents except for a limited request, which Judge Boal
14 ruled applied to everybody.

15 Interestingly, some of the clinics who have
16 received notice of a claim, a standard letter saying we
17 represent the following individuals who have claims
18 against your healthcare provider in the NECC litigation,
19 some of the clinics who have received those notices
20 still feel that they don't have to respond to the
21 subpoena because the notice has not been properly given
22 under certain aspects of state law.

23 The PSC's position is that Judge Boal used
24 the term "notice of a claim" in its most commonly
25 understood form and didn't say anything about whether

1 that notice has to be done in compliance with the
2 particular requirements of one state or another.

3 So the PSC is conducting meet and confers
4 and will be also preparing to file a motion to compel
5 with respect to one such clinic here very shortly.

6 THE COURT: All right. Anyone else want to
7 be heard on this topic? That's item Number 6.

8 Item Number 7, matters referred to by
9 Judge Boal. Before we get into that, there are a couple
02:16PM 10 of dangling issues raised by the St. Thomas entities.
11 Back at the end of November, St. Thomas had as part of
12 their -- a number of motions that it filed to
13 reconsider, my MDL order and so forth, there was a
14 motion to amend the protective order.

15 I have finally resolved that. I had hoped
16 to have it filed before today so that you could see it.
17 I'm technically granting it in part and denying it in
18 part. I'm going to make some minor tweaks to that
19 protective order, but most of the issues raised by
02:17PM 20 St. Thomas, I think, are either covered in the order or
21 I think it's not necessary to amend the order to
22 address. That we'll get out shortly, hopefully even
23 today.

24 Part of what St. Thomas raised was also a
25 motion to stay discovery pending a discovery plan. I do

1 want to take this up at some point today. What I said
2 about having a discovery plan for the affiliated
3 defendants obviously applies to the unaffiliated
4 defendants as well, some degree of planning and
5 coordination needs to be done here. You know, even in a
6 simple case, we have a scheduling conference where the
7 parties have to meet and confer. That needs to be
8 discussed as well.

02:18PM 9 We don't necessarily need to resolve it
10 today, but that issue does need to be resolved, and with
11 that as an introduction, who's going to take the lead on
12 item 7, Ms. Parker?

13 MS. PARKER: Actually Ms. Dougherty I
14 believe and Mr. Zamora will be addressing that.

15 THE COURT: Ms. Dougherty.

16 MS. DOUGHERTY: Thank you, your Honor.
17 Travellers' motion to quash at this point in time is
18 being negotiated by the PSC with Travellers. Travellers
19 is the insurer for Liberty party in the mediation. At
02:19PM 20 this point, some compromises have been made and reached.

21 THE COURT: I thought Liberty said it had no
22 insurance? Well, whatever. Go ahead.

23 MS. DOUGHERTY: Interesting, yes, and so at
24 this point, the plaintiffs' steering committee sought an
25 extension of time to respond, and your Honor granted

1 MR. SOBOL: Right. And how many defendants
2 there are, whether or not you've got a national
3 defendant or just a local defendant.

4 THE COURT: Right. Presence or absence of a
5 national defendant may make a difference.

6 MR. SOBOL: And our proposal will consider
7 that. I don't think necessarily people have to land on
8 a final decision on that issue on February 6th or
9 whatever the next status conference is, and we'll also
10 look into whether or not it makes sense for this Court
11 to sit on a trial down in the middle of Tennessee or
12 not.

13 THE COURT: Well, I'd be amenable to
14 anyplace warmer than here, which excludes then the
15 midwest at this point in time. I think somewhere we
16 have lawyers from Traverse City, Michigan, and my mother
17 lives in Traverse City, Michigan, and it was 10, 15
18 below zero for long stretches. She didn't even go
19 outside to the mailbox.

20 All right. Anything else on item 8? Yes,
21 Ms. Greer.

22 MS. GREER: It's not clear where the
23 deposition protocol and ESI and discovery plans stand at
24 this point. There hasn't been an order on that
25 referring it to Judge Boal, and so we just would ask for

1 some clarification as to whether you're going to be
2 handling that because we're hearing a lot about meet and
3 confer. We are working on protocols, we are exchanging
4 them, but they're kind of in no man's land right now.

5 THE COURT: Why don't I do this. Certainly
6 as to the St. Thomas entities that you represent, I'm
7 going to direct the parties to meet and confer on the
8 discovery plan. I may spin some of this off to
9 Magistrate Judge Boal, I may keep it, I don't know, but
02:27PM 10 certainly it makes sense for you all to get together and
11 talk about what you think makes sense to see if you can
12 agree, and we'll handle it that way. Okay.

13 MS. GREER: Okay.

14 THE COURT: Does that work?

15 MS. GREER: Does that go for the deposition
16 protocol and my protocol are kind of --

17 THE COURT: I was thinking of discovery
18 protocol, which, in other words, discovery from
19 plaintiffs are going to be dealt with in the short term,
02:27PM 20 the fact sheets and so forth. Discovery from your
21 client's perspective, I want you to meet and confer and
22 talk about a possible plan. I don't know what the ESI
23 issues are, I don't know what the volume of documents
24 are. I don't have any idea what the issues are, and
25 step 1 is for you to confer with one another, and as

1 Mr. Sobol suggested, if you can agree on a plan, that's
2 great, if you can't, let's tee it up, I may decide it, I
3 may refer it to Magistrate Judge Boal, and we'll go from
4 there.

5 MS. GREER: Our thinking, right or wrong,
6 was that the discovery plan we talked about in sequence,
7 you had talked about having written discovery first and
8 then depositions, et cetera.

9 THE COURT: That's usually the way it works.

02:28PM

10 MS. GREER: Usually in my experience, and
11 then separate from that would be an ESI protocol that
12 just deals with the ESI issue which would be cumbersome
13 documents and just deals with the separate protocol, and
14 we have been working on drafts of those, so I just
15 wanted to make sure that you understood how this is
16 playing out kind of in the real world, and we're okay
17 with that.

18 THE COURT: All right. That's fine. Again,
19 from my perspective, what I want is I want there to be
02:29PM 20 some degree of planning, I want it to be fair, I want
21 this to be as organized as it can be under the
22 circumstances. Obviously, I'm doing a lot of this kind
23 of ad hoc, but as in any case before you take discovery
24 from the other side, there needs to be some kind of plan
25 in place or order that directs and sets deadlines and so

1 on, so why don't we get working on that.

2 If your client is in the cross-hairs and it
3 looks like it is, you need to meet and confer with the
4 plaintiffs' counsel and try to come up with either a
5 joint plan or a pair of proposals that I can choose
6 between.

7 MS. GREER: Will do.

8 THE COURT: If you want intelligent
9 commentary on any ESI protocol, you may have to find
02:29PM 10 another Judge. I'm not sure I'm the right person for
11 that.

12 Item 9, notice of instructions for accessing
13 repository.

14 MS. PARKER: Yes, your Honor, the
15 plaintiffs' steering committee sent a letter to all
16 defendants in the MDL, both unaffiliated and affiliated,
17 sharing information about the document repositories and
18 also providing some instructions for how access to those
19 repositories can be gained. Out of an abundance of
02:30PM 20 caution, we also took the liberty of ECFing a notice of
21 those instructions to make sure that every participant
22 in the MDL understood how those repositories could be
23 accessed.

24 THE COURT: Okay. Anything else on that?

25 (No response)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing
transcript, Pages 1 through 70 inclusive, was recorded
by me stenographically at the time and place aforesaid
in MDL NO. 13-02419-FDS, IN RE: NEW ENGLAND COMPOUNDING
PHARMACY CASES LITIGATION and thereafter by me reduced
to typewriting and is a true and accurate record of the
proceedings.

Dated this January 22, 2014.

s/s Valerie A. O'Hara

VALERIE A. O'HARA

OFFICIAL COURT REPORTER